(3)

No. 87-1104

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WALTER ZANT, Warden,

Petitioner,

vs.

WILLIAM NEAL MOORE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The present case involves the extended relitigation of the legality of a proceeding conducted many years ago, in which respondent admitted committing a capital offense. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF ARGUMENT

The expansion of habeas corpus as an instrument of collateral attack is a creation of this Court, and the writ can be retracted by this Court without impairing in any way the historical writ guaranteed by the Constitution.

The considerations underlying *Wainwright v. Sykes* regarding state procedural bars apply with equal force to failure to raise an issue on the first federal petition. The cause and prejudice test should be adopted. A claim that a change in the law constitutes cause under that test is inherently inconsistent with the contention that the change is retroactive on habeas corpus. In the present case, this inconsistency exists under either of the two views of retroactivity.

ARGUMENT

A. Habeas corpus as an instrument of collateral attack is at best a distant relative of the historical "Great Writ."

Suggesting that habeas corpus be limited, as we will below, invariably produces a vehement reaction. "Any murmur of dissatisfaction with [collateral attack on convictions] provokes immediate incantation of the Great Writ, with the inevitable initial capitals, often accompanied by a suggestion that the objector is the sort of person who would

cheerfully desecrate the Ark of the Covenant." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 142 (1970). Before turning to the particular question at hand, then, it may be best to note a frequently overlooked aspect of the writ. Habeas corpus as we know it is vastly different from the procedure on which Blackstone heaped his famous praise. See 3 W. Blackstone, *Commentaries* 129-138 (1768). The historical writ of habeas corpus ad subjiciendum was solely a remedy for illegal detention and could not overturn a conviction of a crime entered in a competent court. Today's writ of collateral attack, in contrast, nearly always questions a judgment of a court of unquestioned jurisdiction.

The common law writ was usually issued to free a person summarily imprisoned by the executive, although summary judicial imprisonments were sometimes involved. See, e.g., *Bushell's Case,* 124 Eng.Rep. 1006 (1670). A conviction by a court of *limited* jurisdiction might be questioned as to jurisdiction, but the writ was denied if the prisoner was in custody for conviction of a crime by a court of competent jurisdiction. See 3 Blackstone, *supra*, at 132 (piracy conviction in admiralty unquestionable). The Great Writ was simply unavailable for collateral attack on such a judgment.[1]

The writ was brought to America and incorporated in our Constitution. U.S. Const. art. I § 9. The first Congress ex-

1 *Bushell's Case, supra*, is not to the contrary. Bushell had not been convicted of a crime. He was jailed for contempt. 124 Eng.Rep. at 1006.

pressly granted the federal courts power to issue the writ. Judiciary Act § 14, 1 Stat. 81 (1789). The common law limitation remained, however. "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous." *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830).

The limitation recognized in *Watkins* remained unchanged and was generally understood to be in force in 1867. In that year, Congress extended the federal writ to state prisoners detained in violation of federal law, but gave no indication that it intended to change the *Watkins* rule. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv.L.Rev. 441, 474-77 (1963).

The development of habeas corpus as a device to relitigate convictions of crime already decided by courts of competent jurisdiction was entirely a judicial invention. It began with the idea that the imposition of both fine and imprisonment, under a statute authorizing only one or the other, was beyond the "jurisdiction" of the court. *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 176 (1873). It was further expanded with the holding that a federal court has no jurisdiction to try an "infamous" crime without an indictment. *Ex parte Wilson*, 114 U.S. 417, 429 (1885). The outer limit of nineteenth century collateral attack was reached in *Ex parte Siebold*, 100 U.S. 371 (1879). On the theory that an unconstitutional statute is absolutely void, it was held that the constitutionality of the statute creating the offense could be reconsidered on habeas. *Id.* at 376-377. The rule was still in force, though, that errors of procedure could not be collaterally attacked, even if they rose to constitutional stature. *In re Belt*, 159 U.S. 95 (1895) (validity of jury waiver

statute); *Matter of Moran* 203 U.S. 96, 105 (1906) (allegedly forced self-incrimination not "jurisdictional").

Inquiry into procedural error was made available in the twentieth century to meet an overriding need. Black defendants were being wrongfully convicted due to infection of the system by racial prejudice, and direct review by this Court was insufficient to correct the injustices. See Friendly, *supra* p. 3, at 154-55; Bator, *supra* p. 4, at 523. In *Moore v. Dempsey*, 261 U.S. 86 (1923), the petitioners had been convicted in a mob-dominated trial and the state corrective process had made no serious inquiry into the due process issue. *Id.* at 87-90; cf. *Frank v. Magnum*, 237 U.S. 309, 333-336 (1915) (state court carefully considered question and decided trial was not mob-dominated). Finally, in *Brown v. Allen*, 344 U.S. 443 (1953), the court addressed the merits of Black petitioners' jury discrimination claims, with only one Justice contending that the state court's resolution of the issue be accepted as final. *Id.* at 545 (Jackson, J., concurring).

The point of this abbreviated history is that the use of habeas corpus as a device to relitigate questions which were or could have been raised in the original trial and appeal is entirely a creation of this Court. The decision in *Brown v. Allen* was not compelled by the common law, the Constitution, or Congress, but only by this Court's need to deal with an urgent sociolegal problem. As the problem fades, so does the need for this massive intrusion on the finality of state judgments. Bator, *supra* p. 4, at 523-24. Like the Constitution itself, habeas corpus is not as an object of worship to be mummified and preserved unchanged, but rather a flexible doctrine which has been and can continue to be expanded *and contracted* to meet the needs of a changing nation. See *Stone v. Powell*, 428 U.S. 465, 482 (1976); see also

Wright, *Habeas Corpus: Its History and Its Future* (Book Review), 81 Mich.L.Rev. 802, 810 (1983).

B. This Court should adopt the *Engle/Reed* "tools to construct the claim" test for evaluating "new law" claims in successive habeas petitions.

The crux of this case is the standard to be applied by federal district courts when a prisoner who has previously been denied federal habeas relief files another petition with a new ground based on a purported change in the law since his first petition. While the law regarding state procedural defaults has developed since 1963, very little has been said about successive petitions. This Court has not had occasion to provide guidance, and the few lower court cases have given the problem cursory treatment. See *Moore v. Blackburn*, 774 F.2d 97, 98 (5th Cir. 1985); *Mays v. Balkcom*, 631 F.2d 52, 53 (5th Cir. 1980).

The lack of guidance for lower courts is evident from the split opinion below. The majority adopted a subjective test based on the petitioner's knowledge and conduct plus the knowledge of his attorney which is imputed to him. *Moore v. Kemp*, 824 F.2d 847, 851 (11th Cir. 1987). The majority then declined to impute to the petitioner knowledge of the availability of a claim unless failure to recognize the claim would have fallen outside the range of competent representation, borrowing the test of competence from *Strickland v. Washington*, 466 U.S. 668, 690 (1984). *Moore*, 824 F.2d at p. 854. Under the majority's test, then, the state can establish an *abuse* of the writ on a "new law" claim only by establishing the same degree of ineffective assistance on the first petition which, if it had occurred at trial, would *entitle* the petitioner to the writ under *Strickland*.

Judge Tjoflat, in dissent, adopted a test from a different line of cases. He found the situation more analogous to the procedural default cases. "If the petitioner possessed the ingredients of his claim (the facts and the law) but simply neglected to bring it in his prior petition, a federal court, pursuant to Rule 9(b), may decline to consider the claim." *Moore*, 824 F.2d at 862, n. 14. Cf. *Engle v. Isaac*, 456 U.S. 107, 133 (1982). Amicus submits that Judge Tjoflat is correct and that the majority is incorrect.

1. Fay v. Noia and Sanders v. United States.

The modern law of procedural default on habeas begins with a pair of cases decided several weeks apart in 1963: *Fay v. Noia*, 372 U.S. 391 and *Sanders v. United States*, 373 U.S. 1. *Fay* involved a claim of involuntary confession which was barred on state collateral review due to Noia's failure to appeal. After an extensive review of the history of habeas corpus, the Court concluded that "the jurisdiction of federal courts on habeas corpus is not affected by procedural defaults . . . during the state court proceedings," with the caveat that "the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts." *Id.* at 438.

Sanders involved a federal prisoner who had filed a second motion under 28 U.S.C. § 2255. The first petition had stated bare conclusions unsupported by facts and was dismissed. The case was arguably different from *Fay* in that it involved a federal prisoner, rather than state, and the default in question was failure to raise the point on the first collateral attack, rather than failure to object at trial or on direct appeal. See *Sanders*, 373 U.S. at 5-6.

The *Sanders* court identified two different "abuse of the writ" problems. One situation, the one involved in the case, involves an attempt to relitigate an issue contained in the previous petition, though perhaps not resolved on the merits. 373 U.S. at 15-17. The second situation involves the new claim. The Court decided not to "deal at length" with this issue and simply stated that *Fay v. Noia* and a companion case, *Townsend v. Sain*, 372 U.S. 293 (1963) "deal at length with the circumstances under which a prisoner may be foreclosed from federal collateral relief. The principles developed in those decisions govern equally here." *Sanders*, 343 U.S. at 18.

Thus the *Sanders* Court itself disclaimed any difference between presenting a new ground not raised in a previous federal petition and presenting a ground procedurally defaulted in the state system. Both situations balance the same opposing interests, finality versus opportunity to have the claim heard, and both are to be governed by the same standard.

Subsequent development in the law of state procedural defaults has caused the holding of *Sanders* to become ambiguous. *Sanders* can be read to hold that "deliberate bypass" is the standard, or it can be read to hold that the standard is the same as for state procedural defaults. The two are no longer the same.

2. The Cause and Prejudice Test.

Ten years after *Fay* and *Sanders*, the deliberate bypass standard set in those cases began to decline. In *Davis v. United States*, 411 U.S. 233 (1973), a § 2255 petitioner challenged as racially discriminatory the composition of the grand jury which had indicted him. Davis had not challenged the grand jury by pretrial motion, as required by Federal Rule of Criminal Procedure 12 (b)(2). The Court held that the rule was an express waiver provision enacted by Congress and therefore could not be defeated by permitting the waived claim to be raised on collateral attack. 411 U.S. at 242.

Davis emphasized the importance of raising the objection before trial in order to allow the trial judge to make the correction, if necessary. If the defendant makes a timely challenge, "inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial." 411 U.S. at 241.

In *Francis v. Henderson*, 425 U.S. 536 (1976), the Court was presented with a state prisoner seeking habeas in circumstances otherwise identical to *Davis*. The practical interests involved were the same. Prompt raising of the objection would have allowed prompt correction. The governmental interests, though, were quite different. The state procedural rule, unlike the federal rules, did not emanate from the same authority that had enacted the habeas statutes. On the other hand, a federal writ of habeas corpus for a state prisoner involves considerations of federal/state comity not involved in a § 2255 proceeding. Notwithstanding these differences, *Francis* adopted the *Davis* cause and prejudice test. *Id.* at 542. Although the *Francis* majority did not explicitly overrule *Fay*, despite a challenge from the dissent to state its position explicitly, *id.* at 546-47 (Brennan, J., dissenting), the result is clearly inconsistent with *Fay's* deliberate bypass standard.

The cause and prejudice test was extended beyond grand jury challenges in *Wainwright v. Sykes*, 433 U.S. 72 (1977).

Petitioner had not objected at trial to the admission of a statement taken without *Miranda* warnings and had not raised the issue on appeal. Florida rules required the suppression motion to be made before trial in most cases. *Id.* at 76, n. 5. *Sykes* followed *Francis* and applied the cause and prejudice test to failure to object to a confession at trial. Unlike *Francis*, the *Sykes* court made its rejection of *Fay* explicit. *Id.* at 87-88, n. 12.

The *Sykes* court repeated the same practical considerations stated in *Francis* and *Davis*. A contemporaneous objection at trial is needed to identify, determine, and if necessary correct the problem and then proceed with the trial. *Id.* at 88-89. The *Sykes* court was also concerned with the possibility of "sandbagging." An objection might be withheld for the purpose of getting two bites at the apple. A defendant might be acquitted, or receive a light sentence, at the first trial. If not, and if reversible error is introduced and the conviction vacated years later, defendant will get a second trial on stale evidence. *Id.* at 89. A contemporaneous objection rule thus requires the defense to concentrate its energies on insuring that the first trial is free of error, not the opposite. *Id.* at 90.

In addition to the above considerations, the *Sykes* court discussed the idea that a procedural default is an independent state ground for the decision. A state may constitutionally require that an objection be raised at a certain point or waived, the argument goes, and thus the affirmance of the conviction rests on the adequate state ground of waiver, not the federal ground of the lack of merit of the objection itself. *Id.* at 81-82. If independent state grounds were really the basis of *Sykes*, though, the cause and prejudice test would not apply. The lack of a federal question is jurisdictional, not discretionary. See *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). If the state ground were, by itself, sufficient to support the judgment, federal courts would have no power to interfere, cause or no cause, prejudice or no prejudice. Because *Francis* and *Sykes* lay down a rule governing the judicious use of power rather than the limitations of power, see *Francis*, 425 U.S. at 538-39, the ground cannot be a jurisdictional one.

The cause and prejudice test was extended to a case involving neither federalism nor Rule 12(b) in *United States v. Frady*, 456 U.S. 152 (1982). Frady had been convicted of murder in the United States District Court for the District of Columbia.[2] Frady brought a § 2255 motion, claiming for the first time that the jury instructions had incorrectly defined "malice," *id.* at 157-58, n. 6, citing two cases decided four and seven years, respectively, after his trial, *ibid.*

The Court of Appeal held that the error had to be considered on a § 2255 motion if it met the "plain error" standard of Federal Rule of Criminal Procedure 52(b), the standard applied on appeal for most errors not objected to at trial. This Court reversed.

The *Davis* holding that rules on habeas could be no more lenient then those on appeal did not imply that they could be no more stringent. 456 U.S. at 164. While the *Davis* court had decided that the rules for preserving an objection for appeal established a floor for considering the issue on habeas, the *Frady* court rejected the contention that the ap-

2 The trial predated the establishment of a separate local court system for the District. *Id.* at 160.

pellate rules could establish a ceiling. Respect for finality of judgments permits the judicial creation of a standard for habeas higher than the one created for appeal by the rules. The cause and prejudice standard of *Davis, Francis,* and *Sykes* was held to be the proper balance between society's interest in finality and the petitioner's interest in belatedly asserting his claim. 456 U.S. at 166-67.

3. Defaults After Trial.

All of the cases from *Davis* to *Frady* had involved failure to object at trial. The primary open question remaining was whether the cause and prejudice standard also applied in the event of failure to raise an issue on appeal. This issue was addressed in *Reed v. Ross*, 468 U.S. 1 (1984). Ross had failed to object to a burden-shifting jury instruction at trial, but the state had no contemporaneous objection rule at the time. *Id.* at 7, n. 4. He also failed to raise the issue on appeal. The Court saw no reason to apply a different standard on that basis.

> This type of rule [requiring legal issues to be raised on appeal or waived] promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case. To the extent that federal courts exercise their § 2254 power to review constitutional claims that were not properly raised before the state court, these legitimate state interests may be frustrated: evidence may no longer be available to evaluate the defendant's constitutional claim if it is brought to federal court long

> after his trial: and it may be too late to retry the defendant effectively if he prevails in his collateral challenge.

Id. at 10.

If any doubt remained that the same test applied for both trial and appellate defaults, it was eliminated in *Murray v. Carrier*, 477 U.S. 478, 490-92 (1986).

4. Successive Federal Petitions.

Looking at the cause and prejudice cases as a group, as charted in Figure 1, we see that only one common thread runs through all of them. In each case, the interest of the petitioner in having his claim heard must be balanced against the interest of the state in having the issue raised at

Figure 1
"Cause & Prejudice" Cases
Reasons for Procedural Bar

	Comity	Federal Rule	State Rule	Need for Trial Obj.	Finality
Davis		•		•	•
Francis	•		•	•	•
Sykes	•		•	•	•
Frady				•	•
Ross	•		•		•
Carrier	•		•		•

the earliest possible stage of the proceedings. While explicit federal and state rules are involved in most of the cases, only one case, *Davis*, actually involves a rule with a "cause" exception and none involve rules with an explicit "prejudice" requirement to invoke the exception. *Frady* does not involve any explicit procedural rule at all. The cause and prejudice standard is not based on a respect for procedural rules as such but on a recognition of the needs underlying these rules, a respect for the finality of judgments, and a belief that there must, at some point, be an end to litigation.

The interests to be balanced were neatly summed up in *Reed v. Ross*. "On the one hand, there is Congress' expressed interest in providing a federal forum for the vindication of constitutional rights of state prisoners . . . . On the other hand, there is the State's interest in the integrity of its rules and proceedings and the finality of its judgments." *Reed*, 468 U.S. at 10. To determine whether the balance results in the same cause and prejudice test in the present case, we must examine both sides of this equation.

In one sense, the state's interest in enforcing procedural defaults grows weaker as the time after trial increases. There is a great deal of difference between avoiding retrial altogether, as objection at trial may do, and merely hastening the retrial, as an objection on appeal or on the first habeas petition may do. In another sense, though, the interest in finality increases with time. Society, the victim or next-of-kin, and arguably even the defendant need to have a final answer at some point. See *Mackey v. United States*, 401 U.S. 667, 690-91 (1971) (Harlan, J., dissenting). With each additional procedure that is permitted, that final day when all can say "it's over" is further postponed. We must, of course, accept direct appeal as a necessary delay and expense to guard against conviction of the innocent. Then there is state collateral attack. Then there is federal habeas. The frustration builds as attack after attack raises anew the possibility that a guilty person may escape justice and as the probability that the defendant is in fact innocent shrinks far below reasonable doubt into the infinitesimal.

Meanwhile the evidence for retrial grows more and more stale. Memories fade; witnesses die or disappear; physical evidence deteriorates or is lost. The ability to conduct a trial which is fair to society and to the victim, as well as to the defendant, decays with time. New trials are ordered on the theory, or at least the hope, that the second trial will determine the truth more reliably than the first. As time marches on that hope becomes a pipe dream.

The state's interest in having claims which were omitted from the first petition barred from consideration on subsequent petitions may be less than its interest in a contemporaneous objection rule in some respects, but it is greater in others. If all claims must be made in the first petition, absent cause and prejudice, most cases will have a definable end – the final disposition of the first federal petition. That is an important interest indeed. It is especially important in capital cases, where the execution of the sentence cannot begin until the end of proceedings is reached. See *Barefoot v. Estelle*, 463 U.S. 880, 888 (1983).

On the other side of the coin is the petitioner's interest in a federal forum for his federal claim. This interest is far less compelling on successive petitions. Even if we assume the deep suspicion of state courts underlying this interest to be valid, it is one thing to say that the petitioner must be allowed entrance to the federal courthouse and quite another to insist that he has a right to take up residence

there. The cause and prejudice test merely requires the petitioner to show that he has a very good reason for not raising his claim earlier, see, e.g., *Amadeo v. Zant,* 56 U.S.L.W. 4460 (May 31, 1988) (evidence of intentional racism in jury selection concealed by the prosecution), and that the claim involves an error which really made a difference. Finally, there is the safety valve recognized in *Murray v. Carrier*, 477 U.S. at 496 for the "extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent."

The balance between finality and the federal forum thus tips at least as far in the government's favor in this case as it did in *Frady, Reed,* or *Carrier*, and the cause and prejudice standard is the appropriate one to apply.

5. Statutory Freezing.

The argument might be made that Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts has frozen the *Sanders* "deliberate bypass" test into place and precluded further development of the case law. Such a drastic change in role of the Court in defining the scope of habeas corpus would probably be within the power of Congress, but it should not be inferred without compelling evidence.

Rule 9(b) as originally promulgated by this Court provided for dismissal of successive petitions alleging new grounds if the failure to assert them earlier "is not excusable." See 28 U.S.C.A. § 2254, Rule 9 at 1136 (1977). Congress changed this language to "constituted an abuse of the writ." 90 Stat. 1334, 1335 (1976). The committee report stated the "not excusable" language gave too broad a discretion to the judge. H.R. Rep. No. 94-1471, reprinted

in 1976 U.S. Code Cong. & Admin. News 2478, 2482. The committee quoted *Sanders* and stated that the change brought the rule into conformity with the law. *Ibid.*

The inference is fairly drawn that Congress intended that the rules themselves not make any change in the law as developed in the cases. It does not follow, however, that Congress intended to preclude further case law development.

The language of *Sanders* and *Fay* was not written into the rule. Instead, the spacious and elastic phrase "abuse of the writ" was used. This phrase is far too vague and general to imply an intent to freeze the case law in place at the point where it happened to be at the time the rules were promulgated. The generality of the phrase is more consistent with an intent to allow the case law to develop unimpeded. That development points inexorably toward the adoption of the cause and prejudice test for all procedural defaults.

C. Only genuinely new rules are sufficiently novel to qualify under *Engle/Reed*.

Once the cause and prejudice test is determined to apply, we must turn to the question of whether cause exists. The clearest example of cause is intentional concealment of the factual basis of the claim by the prosecution. See *Amadeo v. Zant*, 56 U.S.L.W. 4460 (May 31, 1988). When the purported cause is a purported change in the law, the question becomes more difficult.

The issue of novelty of the argument as "cause" is bracketed by the decisions of this Court in *Engle v. Isaac*, 456 U.S. 107 (1982) and *Reed v. Ross*, 468 U.S. 1 (1984). Both cases involved claims that jury instructions had unconstitutional-

ly shifted the burden of proof of an element of the offense to the defendant. In *Engle*, the defendants claimed that lack of self-defense was an element of the crimes as defined by Ohio law and that once they showed evidence of self-defense the prosecution must prove its absence beyond a reasonable doubt. The trials had occurred several years after *In re Winship*, 397 U.S. 358 (1970). In the years between *Winship* and the trials in question, many defendants had relied on *Winship* to challenge instructions placing the burden of proof of particular issues on them. *Engle*, 456 U.S. at 131-33. The Court rejected the idea that failure to raise the claim had to sink to the level of ineffective assistance before it could be barred by the *Sykes* test. A claim need not be one that "every astute counsel" would have made before cause is found lacking. If a defendant does not lack the tools to construct the constitutional claim, novelty of the argument will not constitute cause for failure to comply with the state procedural rule. *Id.* at 133.

In *Reed v. Ross*, the jury in a murder case was instructed that use of a gun raises a presumption of malice shifting the burden of proof to the defendant. 468 U.S. at 6-7. The argument against this instruction would seem on its face to be considerably less novel than the argument advanced in *Engle*. Malice is traditionally an element of murder to be proved by the prosecution, while self-defense is traditionally an affirmative defense which many jurisdictions have required the defendant to prove. See W. La Fave and A. Scott, *Criminal Law* 45, n. 13, 48-49, n. 24, 528 (1972). The *Reed* court distinguished *Engle* by the fact that the trial in *Reed* had occurred before *Winship*. 468 U.S. at 19-20.

Novelty will constitute cause "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel." *Reed*, 468 U.S. at 16. The most common

instance of a claim without a pre-existing "reasonable basis" is where "this Court has articulated a constitutional principle that had not been previously recognized *but which is held to have retroactive application.*" *Id.* at 17 (italics added). *Reed* then equates "not previously recognized" with the "clear break with the past" test. *Ibid.* This "clear break" language is taken from *United States v. Johnson*, 457 U.S. 537 (1982), where the Court indicated that "clear break" cases are "decisions whose nonretroactivity is effectively preordained." *Id.* at 553-54. The *Reed* court found that the pre-*Winship* authority was sufficiently sparse and that the practice of which Ross complained was sufficiently entrenched that the claim fell into one of *Johnson*'s three "clear break" categories. Therefore defense counsel had no reasonable basis to raise it at trial. 468 U.S. at 18-19.

The threads of retroactivity are woven throughout the fabric of *Reed v. Ross*. They show clearly in all three opinions. Justice Harlan had noted the connection fifteen years earlier, when he pointed out that retroactivity on habeas was not an issue until *Fay v. Noia*, 372 U.S. 391 (1963). *Desist v. United States*, 394 U.S. 244, 261 (1969) (Harlan, J., dissenting). The *Reed* majority noted that retroactivity was a distinguishing characteristic of the primary category of cases to which its rule applied. 468 U.S. at 17. The majority also lifted its "clear break" test directly out of retroactivity law. *Ibid.* Justice Powell rested his deciding vote on the state's own procedural default in not raising the retroactivity issue. *Id.* at 20.

The dissent noted the paradoxical result. "But this equating of novelty with cause pushes the Court into a conundrum which it refuses to recognize. The more 'novel' a claimed constitutional right, the more unlikely a violation

of that claimed right undercuts the fundamental fairness of the trial." *Id.* at 21-22 (Rehnquist, J., dissenting).

The correction to the anomaly and the solution to the conundrum, we submit, is to always consider retroactivity with any *Reed* claim. Now that *Griffith v. Kentucky*, ___ U.S. ___, 93 L.Ed.2d 649, 107 S.Ct. 708 (1987) has clearly separated retroactivity analysis on habeas from that on direct review, the *Reed* test must be deemed to refer to genuinely new constitutional principles which are retroactive *on habeas corpus*. Such new principles, we submit, are virtually nonexistent. See *Reed*, 468 U.S. at 26, n. 3 (Rehnquist, J., dissenting).

D. This Court has adopted two different methods for determining retroactivity of new rules.

The essence of a habeas petitioner's *Reed* claim is that the law has changed in an unexpected way and that he should not be "punished" for a lack of clairvoyance. But are the people of a state not entitled to make the same claim? The people's side of the unexpected change ledger is the issue of retroactivity.

In the present case, unlike *Reed*, the relation between retroactivity and cause for default is squarely before the Court. Cf. *Reed,* 468 U.S. at 20 (Powell, J., concurring). The relation was expressly considered by the court below and was discussed in the majority opinion and in one of the dissents. *Moore v. Kemp*, 824 F.2d 847, 853, n. 12 (11th Cir. 1987); *id.* at 870, n. 28 (Tjoflat, J. dissenting).

1. The rise of nonretroactivity: Linkletter-Stovall.

Under an earlier philosophy of jurisprudence, "retroactivity" was not an issue. Courts did not make law, it was thought, but only announced what had always been the law. 1 Blackstone, *supra* p. 3, at 69-70. Unconstitutional statutes were not "invalidated" by the decisions, they had never been true "statutes" at all. *Norton v. Shelby County*, 118 U.S. 425, 442 (1886).

Along with judicial activism and the quasi-legislative promulgation of detailed rules of criminal procedure came the realization that full retroactivity was not constitutionally required. A series of cases in the mid-1960's established a three-part test for retroactivity: (a) the purpose of the rule; (b) the extent of reliance on previous practice; and (c) the effect on the system of justice of full retroactivity. *Linkletter v. Walker*, 381 U.S. 618, 636 (1965); *Johnson v. New Jersey*, 384 U.S. 719, 727 (1966); *Stovall v. Denno*, 388 U.S. 293, 297 (1967). The central concern of this approach seems to be whether retroactivity is needed to reverse the convictions of innocent people. If a rule has a powerful connection with the reliability of the truth-finding process and substantial numbers of innocent people have suffered false imprisonment, the reliance factor is swept away and the impact on the system must be borne as the cost of progress. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel established on collateral review); *Johnson*, at 384 U.S. at 727-28. Conversely, if the rule would exclude evidence in spite of its reliability in order to enforce a collateral policy, the social cost of full retroactivity may be prohibitive. *Linkletter*, 381 U.S. at 637-38. (*Mapp* exclusionary rule not retroactive on collateral review). In this practical cost-benefit analysis the status of review as direct or collateral had little weight. *Stovall*, 388 U.S. at 300-301.

2. The Harlan approach.

By the end of the decade, opposition had begun to form. In *Desist v. United States*, 394 U.S. 244 (1969), Justice Harlan took his stand that retroactivity must be rethought. *Id.* at 258 (Harlan, J., dissenting). Instead of focusing on the purpose of the rule and weighing the costs and benefits of retroactivity, Justice Harlan focused instead on the nature of the judicial process.

The first principle of jurisprudence is that courts decide cases according to the law. The most flagrant violation of this principle is the purely prospective "decision," one that is announced by the court but not applied to the parties before it. Because the power to announce constitutional rules flows solely from the duty to decide cases, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), such "pure" prospectivity is itself of doubtful constitutionality.

A more difficult question arises at the next step of the retroactivity ladder. Ernesto Miranda's conviction was reversed and his confession suppressed. *Miranda v. Arizona*, 384 U.S. 436, 491-92 (1966). Woodrow Whisman, whose similar case was on direct review at the same time, was denied the benefit of the *Miranda* rule. *Whisman v. Georgia*, 384 U.S. 895 (1966) (Douglas, J., dissenting); see *Johnson*, 384 U.S. at 734. How could the Georgia court be correct and the Arizona court in error when they reached

the same result under the same circumstances? It may well be socially efficient to so hold. The reversal of Miranda's conviction had little or nothing to do with the justice of his case,[3] but it was a necessary cost of insuring that arrestees would be made aware of their rights in the future. But is the difference in the treatment of Miranda and Whisman consistent with the Anglo-American system of law built on precedent? Justice Harlan thought not. *Desist*, 394 U.S. at 258-59; accord *Hankerson v. North Carolina*, 432 U.S. 233, 246-48 (1977) (Powell, J., concurring). If a legislature wishes to treat similarly situated people differently, it must at least have a rational basis for doing so. L. Tribe, *American Constitutional Law* § 16.2 (2d ed. 1988). How can this Court simply conduct a lottery?

The final step is the application of the Harlan theory to collateral review. If one accepts the analysis to this point, including the premise that the nature of the judicial process outweighs cost-benefit analysis, there are two principled answers. One could conclude that new rules must be applied on habeas as well, either on the Blackstone theory that law is discovered and not made, or on the theory that a habeas petition is not significantly distinguished from a direct appeal to apply a different rule. On the other hand, one could conclude both that a habeas petition is fundamentally different from an appeal, *Mackey v. United States*, 401 U.S. 667, 682 (1971) (Harlan, J. concurring and dissenting), and that the announcement of a truly new rule

3 The woman Miranda had raped had identified him *before* the now-famous interrogation. *Miranda*, 384 U.S. at 491. The justice of the outcome doubtless escaped her comprehension.

is an actual change in the law and not just a discovery. With the exception of rules which redress violations of rights "implicit in the concept of ordered liberty," *id.* at 693, new procedural rules should not be applied retroactively on habeas in the Harlan view.

E. If *Estelle v. Smith* is retroactive, a claim under it is necessarily not sufficiently novel to qualify under *Engle/Reed*.

In another case, *Dugger v. Adams*, 87-121, amicus has urged the Court to accept the Harlan view of retroactivity on habeas corpus as well as on direct review. That bridge need not be crossed in the present case, however, as both paths of retroactivity analysis lead to the same place. Under either view of retroactivity, the claim that *Estelle v. Smith* applies to this habeas petition is fundamentally inconsistent with the claim that respondent had cause for omitting it from his first petition.

1. Analysis Under Linkletter-Stovall

The *Linkletter-Stovall* analysis is still the method used by the Court for habeas cases to date. See *Allen v. Hardy*, 478 U.S. 255 (1986) (per curiam) (applying *Linkletter-Stovall* to *Batson v. Kentucky*, 476 U.S. 79 (1986)).

The first question normally addressed under the traditional approach is whether the rule in question is really a "new" rule at all or merely an application of an existing rule to different facts. Because respondent cannot have a "novelty" claim unless the rule is new, we will defer this question to the end of the discussion.

Assuming the rule to be new, retroactivity depends on the three *Stovall* factors. See p. 21, *supra*. Examining the purpose of the *Estelle v. Smith* rule, we travel a well-worn path. The purpose of rules protecting the right to counsel during interrogation and protecting the privilege against self-incrimination is one of the most thoroughly discussed areas of retroactivity law. While there is some tangential relation between these rules and the reliability of the fact-finding process, the "purpose" prong of this test is invariably resolved against retroactivity. See *Tehan v. Shott*, 382 U.S. 406, 414-16 (1966) (comment on failure to testify); *Johnson v. New Jersey*, 384 U.S. 719, 729-30 (1966) (*Miranda* and *Escobedo*); *Stovall v. Denno*, 388 U.S. at 297-99 (1967) (counsel at identification); *Solem v. Stumes*, 465 U.S. 638, 643-645 (1984) (requirement that suspect initiate any conversation after invocation of *Miranda* rights).

The second and third *Stovall* factors are significant only when the "purpose" question is not clearly resolved one way or the other. *Desist v. United States*, 394 U.S. 244, 251-252 (1969). The long line of authorities from *Tehan* to *Solem* would seem to resolve the question beyond doubt, but even if they do not, the effect on the system of justice weighs heavily against retroactivity. It is apparent from this Court's own cases that the practice of psychiatric interviews without counsel has been extensive. See *Estelle v. Smith*, 451 U.S. 454 (1981); *Satterwhite v. Texas*, 56 U.S.L.W. 4470 (May 31, 1988); see also *Battie v. Estelle*, 655 F.2d 692 (5th Cir. 1981).

The second *Stovall* factor looks "primarily to whether law enforcement authorities and state courts have justifiably relied on a prior rule of law said to be different from that announced by the decision whose retroactivity is in issue." *Solem*, 465 U.S. at 645-46. "At just what point of predict-

ability *local authorities should be expected to anticipate* a future decision has been unclear, however." *Id.* at 646 (italics added). The second factor is thus closely connected with the question of whether the rule is really new at all.

With the purpose and impact factors weighing heavily against retroactivity, a habeas petitioner seeking to apply *Estelle v. Smith* must establish either (a) that *Smith* is not a new rule at all, so that retroactivity analysis does not apply; or (b) that *Smith* was sufficiently predictable that local authorities and state courts should have anticipated it, making reliance on any prior practice unjustified. In a *successive* habeas petition, however, either of the above arguments collides head on with the contention that the novelty of the argument justifies its omission from the prior habeas petition. A decision is eligible for nonretroactivity if it establishes "a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 (1971) (citation omitted).

Estelle v. Smith did not overrule any clear past precedents. It established a new principle of law, therefore, only if it was a case of first impression whose resolution was not clearly foreshadowed.

The predecessor of the court below[4] examined the retroactivity of *Estelle v. Smith* in *Battie v. Estelle*, 655 F.2d

4 That is, the Fifth Circuit before its division into the present Fifth and Eleventh Circuits.

692, 696-99 (5th Cir. 1987). In deciding that *Smith* did not establish a new principle of law, the Fifth Circuit noted the *Smith* court's reliance on *In re Gault*, 387 U.S. 1 (1967), a case decided eleven years before respondent's first federal petition. The *Smith* holding is squarely premised on *Gault*, quoting the statement "the availability of the [Fifth Amendment] privilege *does not turn upon the type of proceeding in which it is invoked*, but upon the nature of the statement or admission and the *exposure* which it invites." *Smith*, 451 U.S. at 462 (italics added). A better example of clear foreshadowing can scarcely be imagined.

The Fifth Circuit was entirely correct in *Battie* that *Smith* was fully retroactive because it did not establish a new principle of law. *Smith* was clearly foreshadowed by *Gault* and by *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion). This very same foreshadowing conclusively establishes that Moore's counsel *did* have the tools to construct his *Smith* claim at the time of the first petition.

The majority of the court below appears to have taken the position that Moore is excused from not raising the issue in his first petition merely because the claim was not a certain winner at the time, citing such factors of uncertainty as the plurality status of the *Gardner* opinion, *Moore v. Kemp*, 824 F.2d 847, 852 (11th Cir. 1987), and the differences between Georgia and Texas sentencing procedures, *Moore*, 824 F.2d at 853-54. This Court has made it clear, however, that counsel's opinion that a claim has little chance for success does not constitute cause for a default. *Smith v. Murray*, 477 U.S. 527 (1986). The question is whether counsel has the tools to construct the claim. *Gault* plus *Gardner* were more than sufficient tools for Moore's counsel to construct an *Estelle v. Smith* claim in

November of 1978. Battie's counsel had done so three months earlier. *Battie v. Estelle*, 655 F.2d at 696.

2. Analysis Under the Harlan-Powell Approach.

Under the Harlan-Powell approach, the analysis is considerably simpler. Petitions for writs of habeas corpus should be judged "according to the law in effect when [the] conviction became final." *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J. concurring and dissenting). Exceptions are made only for decisions which preclude punishment for the conduct in question altogether, *id.* at 692, and "for claims of nonobservance of those procedures that . . . 'are implicit in the concept of ordered liberty,' " *id.* at 693, quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

Neither of the exceptions applies here. Murder is still a crime, and death is still a valid punishment. The procedures of which respondent complains cannot be said to be so fundamentally unfair that the *Estelle v. Smith* rule is essential to the substance of fair hearing. The law to be applied to this petition, then, is the law in effect when this court denied certiorari in 1976. See *Moore v. Georgia*, 428 U.S. 910.

Can it seriously be contended that the *Estelle v. Smith* claim was not reasonably available to counsel in 1978 while at the same time contending that the conviction was reversible on that basis in 1976? No. The two propositions are logically contrary, i.e. one or the other or both must be false.

Respondent cannot possibly be entitled to a writ of habeas corpus. In the process of showing that *Estelle v. Smith* is retroactive he must necessarily negate cause for his own default.

F. There has been no fundamental miscarriage of justice.

This Court has previously noted that there may be a "fundamental miscarriage of justice" exception to *Sykes*. *Engle*, 456 U.S. at 135. For guilt phase error, this means actual innocence. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). This concept does not easily translate to the penalty phase. In one case, the test applied was whether the error "serve[d] to pervert the jury's deliberations." *Smith v. Murray*, 477 U.S. 527, 538 (1986). Respondent's claim here is virtually identical to Smith's. Both cases involved un-*Mirandized* interviews with court-appointed psychiatrists. No reason appears for a different conclusion.

Conclusion

The decision of the Eleventh Circuit should be reversed and the petition for writ of habeas corpus denied.

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Respectfully submitted,

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